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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ANDREW STILLITTANO, Defendant and Appellant.	G042575 (Super. Ct. No. 06NF1326) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Cathryn E. Lintvedt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo, Peter Quon, Jr., and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Based on an online chat he had with a police officer who was posing as a 13-year-old girl, appellant Jeffrey Stillittano was convicted of attempting to commit a lewd act on a child under the age of 14. He contends his conduct did not rise to the level of an attempted lewd act, but we disagree and affirm the judgment.

FACTS

On March 29, 2006, an undercover vice investigator from the Anaheim Police Department logged onto an internet chat room using the name "lilcutejamie." Going by the name "ryan_hot_m," appellant promptly contacted her, and for the next hour and 15 minutes, they exchanged instant messages online.

At the start of their conversation, appellant asked the fictional Jamie her age, and she said she was 13 years old. Appellant said he was 20 years old, although he was actually 30 at the time. He also asked Jamie if he could see her picture, and she sent him a photo of a youthful looking 17-year-old. Appellant then turned on his webcam so Jamie could see him through a live feed.

Appellant asked Jamie if she had a boyfriend, and when she said no, he asked if she would like to try "cyber sex." Jamie said "[I] guess, never done it before." Appellant then asked her about her masturbation habits and whether she was "feeling horny." Jamie played along, saying she liked to masturbate and was "a little" horny. When appellant said, "[I] have my shorts off do [you] want to see?" she replied "it's up to you . . . if [you] wanna show me." At that point, appellant focused his webcam on his erect penis and began to masturbate. In the process, he and Jamie engaged in the following conversation:

"[Appellant]: Are you horny now?

"[Jamie]: Ya.

"[Appellant]: Is your pussy wet at all?

"[Jamie]: Ya.

"[Appellant]: A [little] or a lot?

"[Jamie]: Gettin' there.

"[Appellant]: Are you touching it?

"[Jamie]: Not yet.

"[Appellant]: Will [you]?

"[Jamie]: I'm making sure my mom doesn't come in.

"[Appellant]: Ok.

"[Jamie]: What do you want me to do?

"[Appellant]: Rub your pussy ok?

"[Jamie]: Ok."

Appellant then asked Jamie if she would "get naked" and "want[ed his] cum?" Jamie said yes to both questions, and moments later, appellant ejaculated. When he asked Jamie what she was doing, she replied, "Rubbing my pussy like you said!" He asked her if she would "put [her] fingers inside" her vagina and "rub her breasts," and she said yes. She also answered in the affirmative when he asked her to take off her "panties."

Before long, appellant said he was "getting hard" and began to masturbate again. He asked Jamie if she would be willing to suck his penis, and she mentioned the prospect of them getting together. Appellant seemed interested, but when Jamie offered to call him and give him her phone number, he didn't follow up on that. Instead, he asked Jamie if she wanted to "fuck" him, to which she replied, "I would like that." Moments later, appellant ejaculated for a second time. He then promptly ended the conversation by signing off on his computer.

The next day, Jamie logged on to the same chat room, and appellant immediately contacted her. As before, his webcam was on, so Jamie could see him. He asked her what she was wearing and if she would make herself "wet" for him. After Jamie signaled that she would, he said, "I wish I could see you" and asked if she would

"suck [his] cock." He also asked if there were any hotels near her house. She suggested that they meet at a park by her house at 5:00 that evening, and appellant said "ok." Saying he would bring condoms and money for a hotel, he told Jamie he could not wait to have sex with her.

After that, appellant asked Jamie to take off her "panties" and "talk sexy" to him. As she began to entice him, he started masturbating and talking about how he was going to "fuck" her that evening. Their conversation culminated in appellant ejaculating in view of Jamie for the third time in 24 hours. Before signing off, he told Jamie he would "see [her] soon," but he did not follow through on their meeting plans. Although the police staked out the park where he and Jamie planned to meet, they did not see appellant there that night.

Based on his internet chats with the fictional Jamie, appellant was charged with two counts of attempting to commit a lewd act on a child under the age of 14, and two counts of attempting to distribute harmful material to a minor. Regarding the former counts, the prosecution theorized appellant was guilty under the "constructive touching" theory because he attempted to induce Jamie to touch herself. The defense argued that theory was not applicable in this case, but the court disagreed. Following a bench trial, the court found appellant guilty on all counts and placed him on probation for five years.

DISCUSSION

Appellant puts forth three arguments as to why his conduct did not rise to the level of an attempted lewd act: 1) He did not implement a concrete criminal plan to physically touch Jamie; 2) as a matter of law, the constructive touching theory does not apply to the crime of attempting to commit a lewd act; and 3) assuming otherwise, the constructive touching theory fails for lack of evidence he used coercion in attempting to induce Jamie to touch herself. Although appellant's first point is undisputed, we find he was properly convicted of attempted lewd conduct under the constructive touching theory.

Appellant was convicted of attempting to violate Penal Code section 288, subdivision (a), which states: "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."[1]

The purpose of this statute is to protect children from being sexually exploited. (*People v. Martinez* (1995) 11 Cal.4th 434, 443-444.) To that end, "courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done." (*Id*. at p. 444.) If the conduct in question is intended to arouse the lust, passion or sexual desire of the perpetrator or the child, "'it stands condemned by the statute.' [Citation.]" (*Ibid*.)

With that in mind, the court in *People v. Austin* (1980) 111 Cal.App.3d 110 (*Austin*) determined the defendant therein could be tried for committing a lewd act based on his actions in commanding an eight-year-old girl to take down her pants at knifepoint. Although the defendant never touched the girl, the court ruled that did not preclude his prosecution under section 288. As a matter of first impression, the court ruled, "The touching necessary to violate . . . section 288 may be done by the child victim on [his or her] own person providing such touching was at the instigation of a person who had the required specific intent." (*Id*. at p. 114.) Since the child victim in *Austin* touched herself (in the process of taking down her pants) at the defendant's instigation, the court found the touching requirement was not an obstacle to the defendant's prosecution for committing a lewd act.

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1 All further statutory references are to the Penal Code.

In coming to this conclusion, the *Austin* court relied on aiding and abetting principles and the well-established rule that one who causes a crime to be committed by an innocent agent — in this case the child victim — is deemed guilty of the crime as a principal. (*Austin, supra,* 111 Cal.App.3d. at p. 114.)[2] The court reasoned, "Significant harm may occur to a child who is caused to engage in or submit to the lustful intendments of a person seeking sexual self-gratification." (*Id*. at pp. 114-115.) Because the defendant's actions in *Austin* evinced such intendments, the court determined "[h]e was responsible for the touching and removal of the child's pants as surely if he had done it himself." (*Id*. at p. 115.)

In *People v. Meacham* (1984) 152 Cal.App.3d 142 (*Meacham*), overruled on other grounds in *People v. Brown* (1994) 8 Cal.4th 746, the court reached the same conclusion as in *Austin*. Meacham photographed several young children after he had "instructed or posed the children in such manner that their hands were caused to be placed upon their own genitalia." (*Id*. at p. 154.) Under those circumstances, it did not matter whether Meacham had actually touched the victims. The court found the "self-touching" by the victims was sufficient to support his convictions for committing lewd acts on the children. (*Id*. at pp. 153-154.)

However, rather than relying on *Austin's* innocent agent rationale, the *Meacham* court employed different reasoning to reach this result. Analogizing to the constructive breaking theory developed in burglary cases, where the owner of a dwelling opens his own door at a burglar's instigation, the court ruled "the children's touching of their own genitalia at the instigation of [Meacham] was a 'constructive touching' by [Meacham] himself." (*Meacham, supra,* 152 Cal.App.3d at p. 153.) Thus, while the

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[2] That rule is codified in section 31, which states: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years . . . to commit any crime . . . are principals in any crime so committed."

Meacham court agreed with *Austin's* holding that acts of self-touching by a child victim are imputed to the defendant when they are done at the defendant's behest, the court determined the constructive touching theory best describes how liability attaches in that situation. (*Id.* at pp. 593-594.)

The California Supreme Court has expressed agreement with the core teaching of *Austin* and *Meacham* that the defendant need not touch the victim in order to be guilty of committing a lewd act on a child. (*People v. Mickle* (1991) 54 Cal.3d 140, 176.) Indeed, our Supreme Court has recognized that, where committed with the requisite sexual intent, either "the actual or constructive [touching] of a child by the accused . . . is presumptively harmful and prohibited by section 288(a)." (*Ibid.*; see also *People v. Scott* (1994) 9 Cal.4th 331, 343 [under the constructive touching theory, a defendant may be convicted of committing a lewd act "where, at the defendant's direction and for a lewd purpose, a young child touche[s] himself."].) Therefore, it is immaterial for purposes of the present case that appellant did not try to touch Jamie. As his conviction was based on the constructive touching theory, he did not have to attempt to touch a child to be guilty of the subject offenses.

That is why appellant's reliance on *People v. Herman* (2002) 97 Cal.App.4th 1369 is misplaced. *Herman* involved a prosecution for attempted lewd conduct which was based on the actual touching theory. Obviously, if a case is tried on that theory, the defendant must do more than merely engage in sexually suggestive conversation with the purported victim over the telephone. Rather, there must be evidence indicating "the defendant intended to carry his lewd intentions into effect" (*id.* at p. 1388), which typically requires proof the defendant arrived at the location where his intended victim was located. (See, e.g., *id.* at p. 1390 [defendant followed up his "lewd telephonic propositions by acting deliberately to meet his victims in person"]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293 [defendant drove to bus station where he expected victim to appear]; *People v. Ansaldo* (1998) 60 Cal.App.4th 1190 [defendant took the

victim to his home and offered her money for sex]; *People v. Reed* (1996) 53 Cal.App.4th 389 [defendant arrived at motel room where he expected to have sex with child victim].) Such proof is unnecessary in a prosecution based on the constructive touching theory because under that theory, the offense can be perpetrated when the defendant and his victim are far away from each other.

While recognizing the theory of constructive touching, appellant argues it should not be extended to the crime of *attempting* to commit a lewd act. However, we disagree. "'An attempt to commit a crime . . . requires only a specific intent to commit it and a direct but ineffectual act done towards its commission, i.e., an overt ineffectual act which is beyond mere preparation yet short of actual commission of the crime. [Citations.] A defendant can be convicted of the attempt to commit most crimes even though a factual impossibility prevented the commission of the crime itself. [Citation.] . . . If the defendant commits acts which are more than mere preparation for committing the acts, which he reasonably sees as necessary to commit the offense, but because of circumstances unknown to him, essential elements of the substantive crime are lacking, he is culpable for the attempt; it is only when the results the actor intends, if they happened as he envisages, would still not be a crime, can he not be guilty of an attempt. [Citation.]' [Citation.]" (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181.)

Here, there is ample evidence appellant specifically intended to commit a lewd act on child under the age of 14. At the outset of his internet chat with Jamie, he asked her how old she was, and was told she was only 13. Nonetheless, appellant persuaded her to engage in "cyber sex" and encouraged her to touch her own genitalia. He also talked about how he wanted to "fuck" her while he was masturbating in front of his webcam. There can be no question he had the requisite intent to arouse, appeal to, or gratify his sexual desires or those of the victim.

The evidence also shows appellant's conduct went beyond mere preparation to commit a lewd act on a child. After obtaining Jamie's photograph and activating his

webcam, he engaged her in sexually explicit conversation geared toward his sexual gratification. During this time, he repeatedly asked Jamie to touch herself and "talk sexy" to him. He also focused his webcam on his penis and masturbated to the point of ejaculation on three occasions. Had Jamie been a real 13-year-old, as appellant envisioned, his conduct would have resulted in a sexual touching, as opposed to mere preparation. Therefore, his conduct is punishable under the general principles respecting the attempted commission of a criminal offense.

Judicial precedent also supports appellant's convictions for attempting to commit a lewd act on a child, as the case of *People v. Imler, supra,* 9 Cal.App.4th 1178 (*Imler*) illustrates. *Imler* involved a telephone call between the defendant and a 12-year-old boy. The defendant falsely claimed he was holding the boy's father as a hostage. He then demanded money from the boy and ordered him to disrobe and touch his penis. Even though the boy did not do so, the court affirmed the defendant's conviction for attempting to commit a lewd act on a child, because his actions in calling the boy, speaking to him and directing him to commit a lewd act went beyond mere preparation and signaled his intent to commit that offense. (*Id.* at p. 1182.)

Appellant argues *Imler* was wrongly decided. His criticism of the decision stems from his belief that in order for the courts to presume an element of an offense has been satisfied under the constructive theory — whether it be the breaking element for burglary, or the touching element for committing a lewd act on a child — there must be evidence the element in question was actually established in that case. That makes perfect sense when the defendant is charged with a completed offense. But when, as in *Imler* and in the instant case, the defendant is unsuccessful in his attempt to break the law, there is simply no reason to require proof of the completed offense. In fact, that would undermine the reason for criminalizing attempts, which is to punish people for trying, *but failing,* to break the law.

Appellant fails to recognize this point. He also fails to recognize the constructive theory of culpability works equally as well in the context of an attempted crime as it does for a completed one. As the *Meacham* court explained, the term "constructive" has been defined in the law as, "'That which is established by the mind of the law in its act of *construing* facts, conduct, circumstances, or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; . . .' [Citation.]" (*Meacham*, *supra*, 152 Cal.App.3d at p. 153.)

In other words, the constructive theory allows the courts to construe the facts of a case to mean one thing, even though that construction may not truly represent the meaning ascribed to them. That is basically what the courts have done in interpreting the touching requirement in section 288. Given the statute's intent to protect minors from sexual abuse, the courts have decided that where the victim touches him or herself at the instigation of the defendant, it is legally equivalent to the defendant touching the victim.

We see no reason why this theory cannot be applied in situations where, acting with the requisite lewd intent, the defendant unsuccessfully attempts to have the victim touch him or herself. To the contrary, we believe that including this scenario within the terms of section 288 will deter people from attempting to engage in any sort of sexually suggestive dialogue with children, which in turn, should lead to a reduction in the number of lewd acts that are actually carried out against younger individuals. Since that is the principal objective of the statute, we hold the lack of an actual touching — either by the defendant or the victim — is not grounds for reversal in this case.

The remaining question is whether, from a factual standpoint, appellant's conduct was sufficient to justify his convictions for attempted lewd conduct under the constructive touching theory. Appellant argues that even if that theory is viable in this case, his convictions must still be reversed because he did not use coercion in attempting to induce Jamie to touch herself; rather, he simply *asked* Jamie to touch herself during the

course of their illicit conversations. In so arguing, appellant fails to recognize that coercive conduct is not required under the statute of which he was convicted, section 288, subdivision (a). It is required under subdivision (b) of that section, which criminalizes lewd acts which are committed "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person[.]" (§ 288, subd. (b)(1).) However, unlike subdivision (b), subdivision (a) targets lewd conduct against children irrespective of whether the conduct entails any manner of coercion. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 51.) Indeed, subdivision (a) "assumes that young victims suffer profound harm *whenever they are perceived and used as objects of sexual desire*." (*People v. Martinez, supra*, 11 Cal.4th at p. 444, italics added.)

As explained above, case law firmly establishes a defendant may be convicted of violating or attempting to violate section 288, subdivision (a) under the constructive touching theory. While the conduct involved in those cases may have gone beyond mere instigation, into the realm of coercion, the courts have never required evidence of coercion under this theory. And because imposing such a requirement would undermine section 288's goal of protecting children from any and all forms of sexual abuse, we decline appellant's invitation to do so in this case. For purposes of that statute, it is sufficient that appellant contacted Jamie online, engaged her in sexually explicit conversation and encouraged her to touch her genitalia while he was pleasuring himself. Such conduct clearly shows appellant was trying to get a 13-year-old girl to touch herself for the purpose of sexual gratification. We therefore find there is sufficient evidence to support his convictions for attempting to commit a lewd act on a child. No cause for reversal has been shown.[3]

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[3] In attacking his convictions for felony lewd conduct, appellant notes his conduct arguably fell within the ambit of several misdemeanor offenses that were not charged in this case. (See, e.g., § 653m [prohibiting obscene communications by means of an electronic device]; § 647.6 [prohibiting the annoying or molesting of a minor].) However, prosecutors have broad discretion in deciding what charges to bring. (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 61.) Just because appellant's conduct may have constituted a misdemeanor does not mean he was not properly convicted of a felony. (*People v. Valladares* (2009) 173 Cal.App.4th 1388,

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.

1392-1394 [defendant properly convicted under statute making it a felony to falsify immigration documents, even though his actions also fell within the terms of a misdemeanor statute proscribing the same conduct].)